

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Citizens Bank & Trust Company,)	
)	
Plaintiff,)	Civ. No. 2000-81
)	
v.)	
)	
William L. Rago and Rose Rago,)	
)	
Defendants.)	
)	

ATTORNEYS:

W. Mark Hillsman, Esq.
St. Thomas, U.S.V.I.
For the plaintiff,

Henry V. Carr, III, Esq.
St. Thomas, U.S.V.I.
For the defendants.

MEMORANDUM

Moore, J.

William and Rose Rago (collectively the "Ragos" or "defendants") move for a stay of proceedings on Citizens Bank & Trust Company's ("Bank" or "plaintiff") motion for summary judgment¹ pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. For the reasons set forth below, this Court will deny defendants' motion.

¹ The Bank filed a notice of its motion for summary judgment and its service on defendants on April 19, 2001. No motions have been filed since that time.

I. Facts

This is a mortgage foreclosure case involving a condominium unit at Pineapple Village. The Ragos executed a mortgage in the sum of \$325,000 and interest accruing at 10% with Clifford C. Copp and his wife, Beth (collectively "Copps"). The Copps later assigned this mortgage to the Bank for \$307,342.54. (Defs.' First Set of Interrogs, No. 3.)² The mortgage provided that, in the event of default, the lender may accelerate payment of the unpaid principal and interest. The Ragos defaulted on the loan and on January 24, 2000, the Bank provided them with written notice of their default and stated that they had thirty days within which to cure the default. After the Ragos did not timely cure the default, the Bank accelerated the loan, making the entire balance due of \$338,051.76 as of March 22, 2001.³ On January 25, 2001, this Court appointed Peter Briggs of John Foster Real Estate as receiver and ordered the Ragos to "turn over . . . any and all funds in their possession, including any and all rent deposits, relating to any rental agreements or other bookings" and prohibited them from interfering with the property. *See Citizens Bank & Trust Co. v. Rago*, Civ. No. 2000-01 (D.V.I. Jan. 25, 2001)

² The Bank filed suit against the Copps in Missouri for the guaranty, which apparently is being settled. *See Citizens Bank v. Rago*, Civ. No. 2000-81 (D.V.I. Sept. 5, 2001) (Order).

³ Interest continues to accrue at \$74.08 per diem.

(Order Appointing A Receiver). According to the Bank, the Ragos consistently have failed to abide by this order. In particular, the Ragos have: failed to provide information on their short-term tenants; failed to pay over the rents and deposits; and have occupied the property, without the knowledge of the receiver, while the receiver was attempting to rent the property out.

(Pl.'s Opp. to Defs.' Mot. for Stay of Proceedings on Mot. for Summ. J. at 4-5.)

II. Rule 56(f)

In their motion for a stay, the Ragos argue that summary judgment is inappropriate as they need additional time for discovery. In particular, they state that plaintiff has not provided evidence of the actual amount paid to the Copps for the assignment of the mortgage and that such information is necessary in order to determine whether to implead the Copps. Assertions of inadequate time for discovery come within the purview of Rule 56(f) of the Federal Rules of Civil Procedure. This rule "affords a party opposing summary judgment, who has not had the time or means to discover facts necessary to defeat the motion, the ability to ask the court to grant a continuance or deny the motion altogether." *Annulli v. Panikkar*, 200 F.3d 189, 201 (3d Cir. 1999).

Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

FED. R. CIV. PRO. 56(F). The Third Circuit Court of Appeals has interpreted Rule 56(f) motions as imposing certain requirements on the movant. In particular, when seeking additional discovery, the movant needs to "submit an affidavit specifying . . . what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not been obtained previously. See *Dowling v. City of Philadelphia*, 855 F.2d 136, 140 (3d Cir. 1988); see also *Pastore v. Bell*, 24 F.3d 508, 511 (3d Cir. 1994) (citing *Dowling*, 855 F.2d at 140). As the Ragos have not satisfied these requirements nor are their arguments compelling enough to justify a continuance, I will deny their motion.

A. Affidavit Not Filed

Although the Ragos recited the information they are looking for in their motion for a stay of proceedings, namely, how much consideration the Copps received for the assignment of the mortgage, they have not filed the affidavit Rule 56(f) requires. If this were the only deficiency, it might not necessarily be

fatal to the defendants' motion. *See Annulli*, 200 F.3d at 201 (failing to file a Rule 56(f) affidavit is usually fatal); *Pastore*, 24 F.3d at 510-11 (Rule 56(f) "explicitly provides that the party must file an affidavit setting forth why time is needed"); *Dowling*, 855 F.2d at 140 (failure to file an affidavit means that the movant has failed to comply with the rule); *but see St. Surin v. Virgin Islands Daily News*, 21 F.3d 1309, 1314 (3d Cir. 1994) (failure to support a Rule 56(f) motion by affidavit is not automatically fatal to its consideration). As the Ragos, however, have not satisfied the other requirements of Rule 56(f), their failure to file an affidavit must weigh against them.

B. Information Would Not Preclude Summary Judgment

There is nothing in the Ragos' motion that remotely even suggests how the desired information would defeat the Bank's summary judgment motion. All the Ragos do is assert that "it [is] curious why plaintiff is not pursuing [the Copps] on the personal guaranty as vigorously as it is pursuing the[] defendants," (Defs.' Mot. for Stay on Proceedings on Mot. for Summ. J. at 2), and maintain that they need time to determine whether to implead the Copps. Nowhere do the Ragos contend that they do not owe the money or otherwise assert a defense to the motion for summary judgment. The Guaranty Agreement

("Agreement") between the Ragos and the Copps states that "[i]f Borrower [the Ragos] is in default under any agreement between Borrower and Lender [the Bank], Lender may collect the amounts owed by Borrower directly from me [the Copps]." (Consumer Guaranty, Ex. C, Pl.'s Opp to Defs.' Mot. for Stay of Proceedings on Mot. for Summ. J. (emphasis added)) The Bank clearly reserved the option of going against either the Copps or the Ragos; the only limitations being that the Copps are liable for only 80% of the loan, not to exceed \$307,342.54. (*Id.*) Accordingly, it is irrelevant how strenuously the Bank is pursuing the Copps on the guaranty. The Bank has the right to seek compensation from the Copps and the Ragos separately or together, so long as the total award does not exceed the amount of the loan outstanding. Therefore, how much consideration the Copps received for the assignment can have no effect on plaintiff's motion for summary judgment. Likewise, the possible impleading of the Copps by the Ragos will have no bearing on the summary judgment motion⁴ and the Bank is entitled to judgment.

⁴ The Ragos have been "considering" impleading the Copps since March 6, 2001. See *Citizens Bank v. Rago*, Civ. No. 2000-81 (D.V.I. Mar. 6, 2001) (Order).

Moreover, this Court has previously held that "summary judgment may be entered after there has been adequate time for discovery. Uncompleted discovery does not bar summary judgment." *Suid v. Phoenix Fire*, 26 V.I. 223 (D.V.I. 1991). In regard to this case, this Court noted that "written discovery will be substantially completed by May 15, 2001." See *Citizens Bank v. Rago*, Civ. No. 2000-81 (D.V.I. Mar. 6, 2001) (Order). As the requested information was already provided and no additional information appears to be outstanding, there has been adequate time for discovery. Thus, any incomplete discovery does not bar a motion for summary judgment in favor of the Bank, even if it might have some relevance to the plaintiff's motion.

III. Conclusion

As the Ragos have failed to comply with Rule 56(f), I will deny their motion for a stay of proceedings. The Ragos shall respond to plaintiff's motion for summary judgment within **ten (10) days** of the date of this decision.

ENTERED this 11th day of October, 2001.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

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William L. Rago and Rose Rago,)	
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Defendants.)	
)	

ORDER

For the reasons set forth in the above Memorandum, it is hereby

ORDERED that defendants' motion for a stay of proceedings on plaintiff's motion for summary judgment is **DENIED**; it is further

ORDERED that defendants will respond to plaintiff's motion for summary judgment within ten (10) days of the date of this order.

ENTERED this 11th day of October, 2001.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

Mrs. Jackson
Henry V. Carr, III, Esq.
W. Mark Hillsman, Esq.
Michael Hughes

By: _____/s/_____
Deputy Clerk

cc: Hon. G.W. Barnard